APPEAL NO. 040783
FILED MAY 27, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on March 5, 2004. The hearing officer resolved the disputed issue by deciding that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the second quarter, beginning November 11, 2003, and ending February 9, 2004. The claimant appealed, disputing the determination of nonentitlement. The appeal file did not contain a response from the respondent (carrier).

DECISION

Affirmed.

The claimant attached documents to her appeal, some of which were not admitted into evidence at the hearing. Documents submitted for the first time on appeal are generally not considered unless they constitute newly discovered evidence. *See generally* Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). In determining whether new evidence submitted with an appeal requires remand for further consideration, the Appeals Panel considers whether the evidence came to the knowledge of the party after the hearing, whether it is cumulative of other evidence of record, whether it was not offered at the hearing due to a lack of diligence, and whether it is so material that it would probably result in a different decision. *See* Texas Workers' Compensation Commission Appeal No. 93536, decided August 12, 1993. Upon our review, we cannot agree that the evidence meets the requirements of newly discovered evidence, in that the claimant did not show that the new evidence submitted for the first time on appeal could not have been obtained prior to the hearing or that its inclusion in the record would probably result in a different decision. The evidence, therefore, does not meet the standard for newly discovered evidence and will not be considered.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). The parties stipulated that the carrier accepted as compensable an injury to the right shoulder and the lumbar and cervical spine; that the qualifying period for the second quarter began July 30 and ended October 28, 2003; that the claimant attained maximum medical improvement by operation of law on May 6, 2002, with a 22% impairment rating; that the claimant was released to return to work on August 15, 2003, with restrictions, and was deemed capable of working in a sedentary capacity; and that impairment income benefits were not commuted. In her appeal, the claimant appeals both the stipulation regarding what the carrier accepted as a compensable injury and the stipulation regarding her release to return to work. The record reflects that the claimant agreed to both these stipulations at the CCH. We note that Section 410.166 provides that an oral

stipulation or agreement of the parties that is preserved in the record is final and binding.

Rule 130.102(d)(5), relied on by the claimant in this case for SIBs entitlement, provides that the good faith requirement may be satisfied if the claimant "has provided sufficient documentation as described in subsection (e)." Rule 130.102(e) states that "an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts." The rule then lists information to be considered in determining whether the injured employee has made a good faith effort, including, among other things, the number of jobs applied for, applications which document the job search, the amount of time spent in attempting to find employment, and any job search plan. The claimant contends in her appeal that she sought employment in each week of the qualifying period. The hearing officer noted in her Statement of the Evidence that no employment applications were listed as having been made between October 16, 2003, and October 27, 2003. The record reflects that a job search was listed on October 28, 2003, the last day of the last week of the qualifying period. Therefore the record indicates that a job search has been listed for each week of the qualifying period. However, there was evidence from the carrier that the job contact listed on October 28, 2003, was by application dated November 2, 2003. Additionally, the hearing officer specifically found that the claimant did not seek work within her restrictions every week of the qualifying period; was not registered with the Texas Workforce Commission; and did not have a job search plan. The type of jobs sought by the injured employee is also listed as one of the factors that may be considered in determining whether the injured employee has made a good faith effort to obtain employment under Rule 130.102(d)(5). The hearing officer was not persuaded that the claimant made a good faith effort to seek employment during the qualifying period for the second quarter.

The claimant also contended that she satisfied the good faith requirement pursuant to Rule 130.102(d)(2) by satisfactorily participating in a full-time vocational rehabilitation program sponsored by the Texas Rehabilitation Commission during the qualifying period. Whether the claimant satisfied the good faith requirements of either Rule 130.102(d)(2) or Rule 130.102(d)(5) was a factual question for the hearing officer to resolve. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). In view of the evidence presented in this case, we cannot conclude that the hearing officer's determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **TEXAS PROPERTY & CASUALTY INSURANCE GUARANTY ASSOCIATION for Reliance National Indemnity Company, an impaired carrier** and the name and address of its registered agent for service of process is

MARVIN KELLY
9120 BURNET ROAD
AUSTIN, TEXAS 78758.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Edward Vilano
Appeals Judge